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# The Convergence of International Trade and Investment Arbitration

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# **The Convergence of International Trade and Investment Arbitration**

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## **I. Introduction**

International trade and investment arbitration are distinct disciplines within the field of international economic law. Practitioners and scholars in one field rarely labor in the vineyards of the other. Yet the trade and investment arbitration regimes routinely overlap and are increasingly converging. They promote similar objectives—globalization, economic integration, trade promotion, and investment protection. They are often embedded in the same treaties, such as part of preferential trade agreements. They incorporate similar substantive protections, particularly the rules against discrimination and protectionism. They both use international tribunals as the vehicle for dispute settlement, thereby allowing for judicial review of sovereign state violations of international law. As of late, they both use the economic leverage of tariff benefits to secure compliance with adverse judicial decisions. They both are on the ascendance, with countries clamoring to reap the rewards of membership in each club.

There are, of course, numerous differences between the trade and investment regimes worthy of examination. In many respects, the two disciplines are distinct, and it is therefore little surprise that the academy and the bar do not treat them as a single legal order. However, for purposes of this paper, I wish to focus on the overlap and convergence between the trade and investment regimes.

Part I of this paper addresses will address the trend toward incorporating investment arbitration chapters in preferential trade agreements, thus reflecting the need for deeper forms of legal protection in response to the changing nature of international trade, particularly the intra-firm globalized chains of supply. Corporate outsourcing of production generates tremendous demand for lower trade costs and enhanced investment protections. Part II concerns the converging commitments in trade and investment arbitration against protectionism and discrimination. Although the national treatment tests embodied in the World Trade Organization (WTO) agreements differ from that in most bilateral investment treaties (BITs), both regimes are concerned with establishing rules to effectively regulate different forms of *de facto* or *de jure* discrimination. The other points of convergence focus on various aspects of dispute settlement. Part III discusses the trend toward parallel WTO and BIT proceedings, which is only possible through the convergence of substantive norms. This convergence encourages a foreign investor, who is independently pursuing a BIT claim to contemporaneously persuade its home government to diplomatically espouse a WTO claim. Part IV addresses the use of trade remedies to enforce arbitration awards. This has occurred when a developed country (such as the United States) threatens to remove—preferential trade benefits to a developing country (such as Argentina) if the developing country does not honor its international arbitration commitments. Part V addresses the emerging trend of relying on investment arbitration to enforce international trade rights. Despite the assumption that international trade disputes must be resolved before the WTO Dispute Settlement

Body, the existence of broad umbrella clauses in BITs presents an emerging vehicle for enforcing investment commitments in trade agreements.

## II. Investment Chapters and Preferential Trade Agreements

The most obvious point of convergence between international trade and arbitration is evident in the increasingly common practice of combining trade and investment arbitration in a single treaty. The most frequent manifestation of this trend is in the investment chapters embedded in preferential trade agreements (PTAs).<sup>1</sup> Most scholarship on investment arbitration focuses on BITs, and diminishes the importance of investment chapters in PTAs.<sup>2</sup> This is despite the fact that the number of BITs is on the decline and the number of PTAs with investment chapters is on the rise.<sup>3</sup> A characteristic feature of PTAs is that they “combine foreign direct investment . . . and trade to create global supply chains that maximize productivity through the distribution of production among a number of countries.”<sup>4</sup>

In a recent study on PTAs, 587 agreements between 3310 countries, dating from 1945 to 2009, were coded based on their content.<sup>5</sup> Of these PTAs, 37% (217 agreements) included investment provisions and 13% (76 agreements) included an investor-host State dispute settlement mechanism.<sup>6</sup> The study distinguished between “shallow” and “deep” PTAs, with the latter including measures “that do not directly concern trade—such as those protecting investments and intellectual property rights and those opening government procurement to foreign bidders.”<sup>7</sup> According to the study, the positive trade effects of deep PTAs “substantially outperform” baseline GATT/WTO trade relationships.<sup>8</sup> Moreover, “the deeper a PTA, the larger is its effect on trade flows between member countries.”<sup>9</sup>

Why would countries sign deep PTAs with investment chapters instead of simply relying on shallow PTAs, the WTO, or BITs? The answer depends on the nature of the trading relationship. PTAs with investment chapters are positively and significantly

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1. See *infra* notes 5-9 and accompanying text.
  2. See, e.g., KENNETH J. VANDEVELDE, *BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION* (2010); RUDOLF DOLZER & MARGRETE STEVENS, *ICSID, BILATERAL INVESTMENT TREATIES* (1995).
  3. Sébastien Miroudot, *Investment, in PREFERENTIAL TRADE AGREEMENT POLICIES FOR DEVELOPMENT: A HANDBOOK*, 307, 308 fig.14.1 (Jean-Pierre Chauffour & Jean-Christoph Maur, eds., 2011).
  4. *Id.*
  5. Andreas Dür, Leonardo Baccini, Manfred Elsig, & Karolina Milewicz, *The Design of International Trade Agreements: Introducing a New Database*, 1, 6 (2012) available at <https://www.dvpw.de/fileadmin/docs/Kongress2012/Paperroom/2012IB-Duer.pdf>.
  6. *Id.* at 11 fig.4.
  7. *Id.* at 30.
  8. *Id.* at 23 tbl.3.
  9. *Id.* at 19.

correlated with intra-firm trade and vertical foreign direct investment.<sup>10</sup> “Intra-firm trade” occurs as a result of globalized outsourcing, that is, when the components of a final product are produced or assembled by affiliated companies in two or more countries and exported back to the home country.<sup>11</sup>

“[C]ountries are more likely to sign” deep PTAs “when intra firm trade is at the higher ends of the value-added chain.”<sup>12</sup> Moreover, intra-firm trade is negatively correlated with BITs and shallow PTAs.<sup>13</sup> In other words, vertical foreign direct investment resulting from globalized supply chains increases the demand for investment chapters in PTAs. The data indicates that—when compared to BITs and shallow PTAs, deep PTAs with investment chapters are generally signed when countries are wealthier and when intra-firm trade is at the higher ends of the value-added chain.<sup>14</sup> In short, deep PTAs are particularly desirable when trade is between rich countries and relates to vertically-integrated production methods that require large capital investments.

According to a WTO study conducted in 2011, following the signing of deep PTAs, trade in production networks between member countries increased by almost 35%.<sup>15</sup> Deep PTAs with investment chapters also have a greater impact on trade flows in some sectors than others. The same study calculated an increase in trade in the automotive parts and information and communication technology of 81 and 56%, respectively, as compared to only 20% in textiles.<sup>16</sup> This suggests that capital-intensive industries that incorporate significant technological know-how and intellectual property are more responsive to deep PTAs.

Deep PTAs with investment chapters mitigate the risks associated with trade and investment that are critical for successful global chains of supply. The preferential trade component of such agreements makes it comparatively cheaper for multinational corporations to secure supply chain inputs from the host country, while the investment protections protect against the political risks associated with large capital investments,

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10. Raymond Hicks & Kris Johnson, *When a BIT Just Isn't Enough: Why We See Investment Chapters in Preferential Trade Agreements* 27 (2012) (unpublished manuscript) (on file with author); Jennifer L. Tobin & Marc L. Busch, *A BIT is Better Than a Lot: Bilateral Investment Treaties and Preferential Trade Agreements*, 62 *WORLD POLITICS*, 1, 8 (2010) (“[V]ertical FDI be the main motivation for multi-nationals looking to invest in developing countries, and thus we should expect them to demand PTAs as well as BITs.”); Miroudot, *supra* note 3, at 307, 318 (“Vertical FDI is associated with efficiency-seeking strategies . . . . [A] PTA is likely to increase FDI through both its trade and its investment provisions.”).
  11. Hicks & Johnson, *supra* note 10, at 9.
  12. Hicks & Johnson, *supra* note 10, at 28.
  13. Hicks & Johnson, *supra* note 10, at 28.
  14. Hicks & Johnson, *supra* note 10, at 6, 28, 32-33.
  15. Gianluca Orefice & Nadia Rocha, *Deep Integration and Production Networks: An Empirical Analysis*, 1, 4, 19 (July 2011), available at [http://www.wto.org/english/res\\_e/reser\\_e/ersd2011\\_e.pdf](http://www.wto.org/english/res_e/reser_e/ersd2011_e.pdf).
  16. *Id.* at 14, 19, 28 tbl.5.

such as expropriation, denial of justice, and discriminatory treatment, and other governmental misconduct. Further, deep PTAs respond to and reflect the needs of vertically-integrated, globalized, multinational corporations. Globalized production lines cannot operate smoothly unless national policies are harmonized. To this end, deep PTAs foster integration with respect to infrastructure, institutions, and product regulations, thus securing cross-border production.<sup>17</sup>

BITs are effective at protecting foreign investors who seek access to the host State's market. The WTO is effective at providing fundamental guarantees with respect to liberalized trade. The guarantees in BITs and the WTO, thus, are baseline protections that reflect international minimum standards that nations accord to every other trading partner. They embody an 'Economic Bill of Rights' of sorts for international relations, the least common denominator of normal trading relations.

Deep PTAs with investment chapters, by contrast, are about special trading partners. They give access to an inner circle of rights that are reserved for privileged economic relationships. They seek to minimize trade costs, maximize market access, and harmonize cross-border regulatory standards. Fundamentally, deep PTAs are concerned with vertical integration and efficient global production lines. Thus, as intra-firm trade and global supply chains proliferate, so shall also PTAs with investment chapters. The deepening of international economic relations portends new types of trade and investment protections. The effective management of trade and investment risks is promoting the convergence of trade and investment arbitration.

### III. Convergence of Trade and Arbitration Norms

In many respects, the international norms reflected in the WTO differ from those guaranteed in BITs. The WTO agreements are concerned with trade liberalization, while BITs are concerned with investment protection. Many WTO norms, such as those addressing tariffs, non-tariff barriers, and unilateral trade remedies have no corollary in BITs. Likewise, BIT protections against unlawful expropriation, denial of justice, and the guarantee of full protection and security have no corollary in the WTO agreements.

However, a common denominator in both the trade and investment treaties is the norm against discrimination.<sup>18</sup> Under the WTO's national treatment obligation, "[t]he

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17. *Id.* at 2-3 ("In order for cross-border production to operate smoothly, certain national policies need to be harmonized to facilitate business activities taking place in several countries. This generates a demand for deep forms of integration. In other words, agreements that include disciplines such as infrastructure, institutions, competition policy, the standardization and harmonization of product regulations, amongst others, would make production sharing activities more secure and less likely to encounter disruptions or restrictions.").

18. If space permitted, one could also discuss convergence with respect to emergency exceptions. Although the non-self-judging economic emergency exceptions in BITs such as the United States-Argentina Bilateral Investment Treaty are distinct from the WTO's self-judging national security

products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded no less favourable treatment than that accorded to like products of national origin in respect to all laws, regulations, and requirements . . . .”<sup>19</sup> BITs also include a similar national treatment obligation. The national treatment obligation embodied in the NAFTA, for example, provides that “[e]ach Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.”<sup>20</sup>

Arbitral tribunals interpreting the national treatment obligation in NAFTA have routinely considered WTO jurisprudence in resolving whether a foreign investor has been accorded no less favorable treatment than domestic investors in like circumstances.<sup>21</sup> In *SD Myers v. Canada*, the tribunal noted that the WTO national treatment obligation must be read in context, and that context included general exceptions relating to environmental protection.<sup>22</sup> It then construed NAFTA’s national treatment obligation—which includes no express environmental exception—to be subject to the environmental

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exception, investment tribunals routinely have relied on WTO jurisprudence in interpreting BIT emergency exceptions. *See, e.g.*, *Cont’l Cas. Co. v. Argentina*, ICSID Case No. AEB/03/9, Award, ¶¶ 182-88 (Sept. 5, 2008); *Enron Corp. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, ¶ 331 (May 22, 2007); *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Annulment Proceeding, ¶¶ 119-27 (Sept. 25, 2007); *Sempra Energy Int’l v. Argentina*, ICSID Case No. ARB/02/16, Award, ¶¶ 379-83 (Sept. 28, 2007); *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, ¶¶ 212-13 (Oct. 3, 2006); *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, ¶¶ 370-73 (May 12, 2005); *See generally* Roger P. Alford, *The Self-Judging WTO Security Exception*, 3 UTAH L. REV. 697, 737-39 & n.272 (2011); Jürgen Kurtz, *Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis*, 59 INT’L & COMP. L.Q. 325, 339, 348-49 (2010); Andrea K. Bjorklund, *Emergency Exceptions: State of Necessity and Force Majeure*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 459, 503-05 (Peter Muchlinski, Federico Ortino & Christoph Schreuer, eds., 2008). Moreover, the latest version of the United States Model BIT mirrors in many respects the WTO security exception and could represent a type of convergence. Moreover, the latest version of the United States Model BIT mirrors in many respects the WTO security exception and could represent a type of convergence. Alford, *supra* note 19, at 739; Treaty Between the Government of the United States of America and the Government [Country] Concerning the Encouragement and Reciprocal Protection of Investment, art. 18, 2004, available at <http://www.state.gov/documents/organization/117601.pdf> [hereinafter U.S. Model BIT].

19. General Agreement on Tariffs and Trade, art. III(4), Oct. 30, 1947, 61 Stat. A-3, 55 U.N.T.S. 187 [hereinafter GATT]. Similarly, GATT, art. III(1) imposes national treatment obligations with respect to internal taxes and other internal charges.
20. North American Free Trade Agreement, U.S.-Can.-Mex., art. 1102(1), Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA]. NAFTA, art. 1102(2), includes similar national treatment language with respect to investments.
21. For a detailed analysis of these cases, see Jürgen Kurtz, *The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents*, 20 EUR. J. INT’L L. 749 (2009).
22. *S.D. Myers v. Canada*, NAFTA/UNCITRAL Trib., 1st Partial Award, ¶¶ 244-247 (Nov 13, 2000), <http://naftaclaims.com/Disputes/Canada/Pope/PopeFinalMeritsAward.pdf>.



policies that form part of NAFTA's context.<sup>23</sup> In *Pope & Talbot v. Canada*, the arbitral tribunal analyzed WTO jurisprudence and rejected the respondent State's narrow definition of what constituted discriminatory treatment.<sup>24</sup> In a third case, *Occidental v. Ecuador*, the arbitral tribunal compared the text of the national treatment provision in the BIT with the text of the national treatment provision in the WTO.<sup>25</sup> The arbitral tribunal concluded that "like situations" were not the same as "like products", and therefore the foreign investors receiving discriminatory treatment did not need to stand in a competitive relationship with the domestic companies receiving the preferential treatment. Finally, in *Methanex v. United States*, the arbitral tribunal painstakingly compared the WTO national treatment provisions with various provisions in NAFTA to conclude that "like circumstances" could not be interpreted to mean "like products."<sup>26</sup>

Whether or not these tribunals reached the correct result, the comparative analysis is worth emphasizing. The leading investment cases interpreting the meaning of national treatment presumed the relevance of WTO jurisprudence. "Like products" in GATT is evidently not the same question as whether foreign and domestic investors are in "like circumstances." Nevertheless, the pull toward reliance on the WTO as persuasive authority appears almost irresistible.<sup>27</sup>

Of course, "like circumstances" are not "like investors." A "like circumstance" is a state of affairs, a condition or factor influencing an investor's regulatory experience.<sup>28</sup> The question is not the indicia of investor likeness, but rather on whether there are "any legitimate reason to distinguish between the foreign and domestic investments in the specific circumstances surrounding [the government regulation]."<sup>29</sup> Despite the fact that the WTO has a different text, different object and purpose, different context, different

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23. *Id.* ¶ 247.

24. *Pope & Talbot Inc. v. Canada*, NAFTA/UNCITRAL Trib., Award on Merits, ¶¶ 45-72 (Apr. 10, 2001), <http://naftaclaims.com/Disputes/Canada/Pope/PopeFinalMeritsAward.pdf>.

25. *Occidental Exploration & Prod. Co. v. Republic of Ecuador*, LCIA Case No. UN3467, Award, ¶¶ 173-177 (London Ct. Int'l Arb. 2004).

26. *Methanex Corp. v. United States*, NAFTA/UNCITRAL Trib., Final Award, ¶¶ 29-38 (Aug. 3, 2005), 44 I.L.M. 1345, 1446-1449, available at <http://www.state.gov/documents/organization/51052.pdf>.

27. I say "almost" because on occasion investment tribunals resolve national treatment claims with no apparent concern for the WTO analogy. See, e.g., *United Parcel Service of America, Inc. v. Canada*, NAFTA/UNCITRAL Trib., Award on the Merits, ¶¶ 80-119 (May 24, 2007). In his dissent in *UPS v. Canada*, Arbitrator Ronald Cass argued that "[t]he wording of Article 1102 suggests a very close parallel to the national treatment obligations contained in the GATT and the GATS, as well as other international trade and investment agreements and treaties. . . . [Article 1102] commands an effective parity of foreign and domestic investors and investments. . . . a reading [that] is consistent . . . with precedent under GATT and WTO." See *id.* ¶¶ 57-61 (Separate Statement of Dean Ronald A. Cass).

28. Nicholas DiMascio & Joost Pauwelyn, *Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?*, 102 AM. J. INT'L L. 48, 85 (2008).

29. *Id.*

institutional framework, and a different remedy, arbitral tribunals cannot avoid the WTO comparison.

The choice of a WTO analogy only adds to the confusion. The national treatment standard in GATS is a closer analogy than that in GATT, requiring each Member to “accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.”<sup>30</sup> This test presumes a competitive relationship between foreign and domestic services, but at least is not burdened with the irrelevant qualitative assessments of “like products” in WTO jurisprudence, much less the nettlesome distinction between “like products” and “directly competitive or substitutable products.”<sup>31</sup>

An even better WTO analog than GATS would be TRIPS. Article 3 of TRIPs states that “[e]ach Member shall accord to the nationals of other Members treatment no less favourable than it accords to its own nationals with regard to the protection of intellectual property.”<sup>32</sup> Like the BIT standard, there is no suggestion in TRIPs that foreign and domestic nationals stand in a competitive relationship. The concern, rather, is about equality of treatment as between domestic and foreign nationals with respect to the regulation and protection of intellectual property rights.<sup>33</sup>

So why do investment tribunals continue to grasp for inapposite analogies from the existing WTO jurisprudence? Perhaps it is because WTO law is seen as “any relevant rule of international law applicable in the relation between the parties.”<sup>34</sup> On this theory, the WTO is part of the larger BIT context, and one cannot interpret the national

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30. See General Agreement on Trade in Services, art. XVII, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 1867 U.N.T.S. 154 [hereinafter “GATS”].

31. See General Agreement on Tariffs and Trade 1994, art. III:1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 1867 U.N.T.S. 154 [hereinafter GATT].

32. See Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 (1995) [hereinafter TRIPs].

33. Another analogy is Article 2.1 of the Agreement on Technical Barriers to Trade, which provides that “Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin . . .” Agreement on Technical Barriers to Trade art. 2.1, Apr. 15, 1994, 1868 U.N.T.S. 120. See *United States-Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, ¶¶ 116-119 (Apr. 24, 2012). Similar to the national treatment standard in BITs, the TBT’s national treatment standard is not subject to a general exception. See Joost Pauwelyn, *What Does Clove Cigarettes Mean for Discrimination Under GATT and Investment Treaties*, INTERNATIONAL ECONOMIC LAW AND POLICY BLOG (Sept. 14, 2011), <http://worldtradelaw.typepad.com/ielpblog/2011/09/what-does-cloves-cigarettes-mean-for-discrimination-under-gatt-and-investment-treaties.html>.

34. Vienna Convention on the Law of Treaties art. 31(3)(c), May 23, 1969, 1155 U.N.T.S. 331 (the treaty interpreter shall take into account “any relevant rules of international law applicable in the relations between the parties.”); see generally Gaetan Verhoosel, *The Use of Investor-State Arbitration Under Bilateral Investment Treaties to Seek Relief for Breaches of WTO Law*, 6 J. INT’L ECON. L. 493, 503-04 (2003).

treatment standard in BITs without taking into consideration how the WTO has interpreted its own national treatment standards.

Or perhaps it is because both trade and investment tribunals are struggling with the same core issue of designing a “national treatment test that eliminates discrimination against foreigners without encroaching too far upon domestic regulatory sovereignty.”<sup>35</sup> In both cases the concern is about establishing rules to regulate *de facto* or *de jure* protectionism or disparate treatment. Accordingly, key insights may be drawn across the regimes in light of the common and unifying purpose of fashioning a national treatment test. Comparative analysis of the national treatment standard is in search of a “cohesive international economic law.”<sup>36</sup>

#### IV. Parallel Proceedings

The convergence of substantive norms gives occasion for the same government measure to generate parallel trade and investment proceedings. Foreign investors by definition are engaged in the international trade of goods and services. When they are adversely affected by a government measure, they will consider all relevant avenues of dispute resolution. Occasionally both investment arbitration and WTO dispute settlement are viable options. This allows a multinational corporation to convince its home government to diplomatically espouse a WTO claim while it pursues in its own right a BIT claim.

As a matter of substantive right, the same set of facts may trigger both investment and trade claims. An import ban on goods or services may give rise to a colorable claim of an indirect expropriation under an investment treaty and a quantitative restriction violation under GATT or a market access violation under GATS.<sup>37</sup> The imposition of performance requirements may give rise to a TRIMs or a GATs claim and a BIT claim.<sup>38</sup> Rank protectionism may lead to a WTO national treatment claim or a BIT claim for fair

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35. Verhoosel, *supra* note 34, at 89.

36. Robert Howse & Efraim Chalamish, *The Use and Abuse of WTO Law in Investor-State Arbitration: A Reply to Jürgen Kurtz*, 20 EUR. J. INT'L L. 1087, 1094 (2009).

37. See, e.g., GATT art. XI; GATS art. \_\_NAFTA, art. 1110; *Metalclad Corp. v. Mexico*, ICSID Case No. ARB(AF)/97/1, NAFTA/UNICTRAL Trib., Award, ¶ 103 (Aug. 30, 2000), 40 ILM 36 (2001) (expropriation under Article 1110 includes “covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.”) \*Check article number with author.

38. See, e.g., Agreement on Trade-Related Investment Measures, art. II, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 186 (1995) [hereinafter TRIMs]; GATS arts. I, XVII; NAFTA art. 1106. \*Is author referring to TRIM treaty or to the TRIP treaty? TRIM has not been introduced prior to this reference, either in the article or as a footnote. Double-check with the author.

and equitable treatment.<sup>39</sup> Preferential treatment toward investors from a particular country may be prohibited by the MFN clauses in GATT, GATS, and BITs.<sup>40</sup>

Such parallel proceedings have occurred on at least three occasions in recent years. With respect to the longstanding softwood lumber dispute between Canada and the United States, the WTO has addressed over half a dozen times the legality of United States tariff duties imposed on Canadian softwood lumber following highly contested domestic AD/CVD proceedings.<sup>41</sup> Among the most controversial of the United States measures implicated in the softwood lumber dispute was the so-called “Byrd Amendment,”<sup>42</sup> which earmarked collected AD/CVD tariff duties for distribution to domestic competitors.<sup>43</sup>

While WTO proceedings were ongoing, Canadian softwood lumber producers brought investment arbitration claims against the United States alleging violations of NAFTA guarantees relating to national treatment, MFN, fair and equitable treatment, and expropriation.<sup>44</sup> These investor claims were consolidated,<sup>45</sup> and, with the exception of the Byrd Amendment, subsequently dismissed.<sup>46</sup> The Byrd Amendment was subsequently

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39. See, e.g., GATT art. III; NAFTA art. 1105.

40. See, e.g., GATT art. I; GATS art. II; NAFTA art. 1103.

41. Appellate Body Report, *United States—Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/RW (Aug. 15, 2006); Appellate Body Report, *United States—Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277/AB/RW (Apr. 13, 2006); Appellate Body Report, *United States—Final Countervailing Duty Determination With Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/RW (Dec. 5, 2005); Appellate Body Report, *United States—Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R (Aug. 11, 2004); Panel Report, *United States—Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277/R (Mar. 22, 2004); Appellate Body Report, *United States—Final Countervailing Duty Determination With Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R (Jan. 19, 2004); Panel Report, *United States—Preliminary Determinations with Respect to Certain Softwood Lumber from Canada*, WT/DS236/R (Sept. 27, 2002).

42. Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act of 2001, Pub. L. No. 106-387, §§ 1001–03, 114 Stat. 1549, 1549A-72 to 1549A-75, *repealed by* Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7601, 120 Stat. 4, 154. See generally Tudor N. Rus, *The Short, Unhappy Life of the Byrd Amendment*, 10 N.Y.U. J. LEGIS. & PUB. POL’Y 427 (2007); Claire Hervey, *The Byrd Amendment Battle: American Trade Politics at the WTO*, 27 HASTINGS INT’L & COMP. L. REV. 131 (2003).

43. Appellate Body Report, *United States—Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R (Jan. 16, 2003).

44. *Tembec, Inc. v. United States*, NAFTA/UNICTRAL Trib., Notice of Arbitration and Statement of Claim (Dec. 3, 2004), <http://www.state.gov/documents/organization/27805.pdf>; *Terminal Forest Products Ltd. v. United States*, NAFTA/UNICTRAL Trib., Notice of Arbitration (Mar. 31, 2004), <http://www.state.gov/documents/organization/31360.pdf>; *Canfor Corp. v. United States*, NAFTA/UNICTRAL Trib., Notice of Arbitration and Statement of Claim (July 9, 2002), <http://www.state.gov/documents/organization/13203.pdf>.

45. *Canfor Corp. et. al. v. United States*, NAFTA/UNICTRAL Trib., Order of the Consolidation Tribunal, (Sept. 7, 2005), <http://www.state.gov/documents/organization/53113.pdf>.

46. The reason for the dismissal was because another NAFTA article was held to preclude investment claims over any AD/CVD matter. *Canfor Corp. et. al. v. United States*,

adjudicated before both the WTO and NAFTA tribunals. The two tribunals reached contradictory results. The NAFTA tribunal concluded that the Byrd Amendment was not a dumping and subsidies measure within the meaning of NAFTA,<sup>47</sup> while the WTO Appellate Body concluded that it was a dumping and subsidies measure within the meaning of the WTO.<sup>48</sup>

The Byrd Amendment was repealed in early 2006.<sup>49</sup> In late 2006 Canada and the United States reached a political settlement through the signing of the Softwood Lumber Agreement ("SLA") and, as a condition to the entry into force of the SLA, the NAFTA claims were subsequently dismissed.<sup>50</sup> Consequently, the full effect of parallel proceedings and the conflicting results rendered by those tribunals was never realized.<sup>51</sup>

The next major instance of parallel proceedings arose in the context of Mexican taxes and duties on various sweeteners. One such measure was a twenty percent tax on soft drinks and other beverages that use a sweetener other than sugar.<sup>52</sup> Mexico's actions gave rise to litigation before the WTO and NAFTA Chapter 19, and investment arbitration under NAFTA Chapter 11.<sup>53</sup>

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NAFTA/UNICTRAL Trib., Decision on Preliminary Question, ¶¶ 188-273 (June 6, 2006) (addressing the jurisdictional limitations imposed by NAFTA, article 1091(3)), <http://www.state.gov/documents/organization/67753.pdf>; John Crook, *Contemporary Practice of the United States Relating to International Law: NAFTA Panel Dismisses Chapter 11 Challenges to U.S. Administration of Antidumping and Countervailing Duty Laws, Allows Byrd Claim to Proceed*, 101 AMER. J. INT'L L. 185, 222 (2007).

47. Canfor Corp. et. al. v. United States, NAFTA/UNICTRAL Trib., Decision on Preliminary Question, ¶¶ 274-349 (June 6, 2006), <http://www.state.gov/documents/organization/67753.pdf>. A closer look suggests that the Byrd Amendment would have fallen within the definition of an AD/CVD measure within the meaning of NAFTA Article 1901(3) if the United States had followed the necessary procedural steps required by NAFTA Article 1901(2). See *id.* ¶ 334.
48. Appellate Body Report, *United States—Continued Dumping and Subsidies Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, ¶¶ 240-42 (Jan. 16, 2003).
49. Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7601, 120 Stat. 4, 154 (2006); see generally Rus, *supra* note 42, at 435-438.
50. Softwood Lumber Agreement between Canada and the United States, U.S.-Can., art. II, Annex 2A, Sept. 12, 2006, TIAS. For a discussion of the parallel proceedings in the softwood lumber dispute, see Andrea Bjorklund, *Private Rights and Public International Law: Why Competition Among International Economic Law Tribunals is Not Working*, 59 HASTINGS L. J. 241, 274-286 (2007); Joost Pauwelyn, *Adding Sweeteners to Softwood Lumber: The WTO-NAFTA "Spaghetti Bowl" is Cooking*, 9 J. INT'L ECON. L. 197, 197-205 (2006); Chi Carmody, *Softwood Lumber Dispute (2001-2006)*, 100 AMER. J. INT'L L. 664 (2006).
51. For a discussion of the parallel proceedings in the softwood lumber dispute, see Leonila Guglya, *The Dispute Settlement Architecture of the Softwood Lumber Agreement 2006: The Interplay of Dispute Resolution Mechanisms in the Late Phases of the Softwood Lumber Controversy*, in 8 TRANSNAT'L DISP. MGMT. (SPECIAL ISSUE: INTERSECTIONS: DISSEMBLANCE OR CONVERGENCE BETWEEN INTERNATIONAL TRADE AND INVESTMENT LAW) 3 (Sept. 2011).
52. Appellate Body Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, ¶ 2 (Mar. 6, 2006).
53. Appellate Body Report, *Mexico—Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/AB/RW (Oct. 22, 2001); Panel Report, *Mexico—Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R

The soft drink tax was imposed after Mexico repealed its unlawful antidumping duties, but the WTO Appellate Body found that the soft drink taxes violated WTO guarantees of national treatment and were not justified under any applicable exception.<sup>54</sup> The fact that the tax was imposed as a retaliatory countermeasure in response to the United States' refusal to comply with its NAFTA obligations did not justify the measure under the WTO.<sup>55</sup>

In the investment arbitration in *Archer Daniels Midland v. Mexico*, the tribunal ruled that the soft drink tax violated NAFTA investment provisions by imposing domestic performance requirements and violating national treatment obligations.<sup>56</sup> It awarded \$33 million in damages for these violations.<sup>57</sup> Tribunals in the related cases of *Corn Products v. Mexico* and *Cargill v. Mexico* likewise found, inter alia, a NAFTA national treatment violation and awarded damages of \$58.4 million and \$77.3 million, respectively.<sup>58</sup>

Mexico repealed the unlawful measures pursuant to a bilateral agreement between the United States and Mexico dated July 27, 2006.<sup>59</sup> The agreement not only guaranteed U.S. sugar and corn sweetener producers with access to the Mexican market, but it also guaranteed reciprocal access by Mexican producers to the U.S. market.<sup>60</sup> Had the WTO been the only forum to adjudicate the dispute, such prospective relief would have been the end of the matter. But the successful pursuit of NAFTA investment claims confirmed the possibility that parallel proceedings may serve to achieve both prospective and retroactive relief, with foreign investors receiving almost \$170 million in damages for injuries suffered as a result of Mexico's unlawful taxes.<sup>61</sup> In this respect parallel WTO and NAFTA proceedings complemented one another.

In another sense, however, this dispute illustrates how WTO and NAFTA proceedings may be a source of conflict. In all three NAFTA proceedings, Mexico argued that its

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(Jan. 28, 2000).

54. Appellate Body Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, ¶¶ 58-84 (Mar. 6, 2006).

55. *Id.* ¶¶ 79-80.

56. *Archer Daniels Midland Co. et al. v. United Mexican States*, ICSID Case No. ARB(AF)/04/05 (Nov. 21, 2007).

57. *Id.* ¶¶ 287-300.

58. *Corn Products International, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/01 (Jan. 15, 2008); *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, ¶ 559 (Sept. 18, 2009).

59. See Letter from Richard Crowder, Ambassador, US Trade Rep., to Lic. Angel Villalobos Rodriguez, Undersecretary, Int'l Trade Negotiations (Jul. 27, 2006) (archived at [http://www.ustr.gov/archive/assets/Trade\\_Agreements/Regional/NAFTA/asset\\_upload\\_file694\\_10810.pdf](http://www.ustr.gov/archive/assets/Trade_Agreements/Regional/NAFTA/asset_upload_file694_10810.pdf)); Magda Kornis, *U.S. Corn Sweeteners and Mexico Sugar: Agreement at Last!*, J. INT'L COMM. & ECON. 1 (Dec. 2006).

60. *Id.* at 10.

61. Chad Bond, *NAFTA Update and Trade News Highlights from February 2011 through April 2011*, 17 L. & BUS. REV. OF THE AMERICAS 613, 613 (2011).

conduct was a legitimate countermeasure in response to United States' international law violations. That defense failed for reasons unique to the disputes, but the NAFTA tribunals clearly were sympathetic to foreign investors' arguments that even legitimate countermeasures could give rise to investment claims, because BIT guarantees are owed to the investor, not the investors' home State.<sup>62</sup> The question thus arises whether the WTO may sanction retaliatory countermeasures for WTO violations, but foreign investors nonetheless may sue for any resulting injuries from such WTO-sanctioned countermeasures. If so, then the most effective tool to secure compliance with WTO obligations may trigger investment arbitration. Investment protections may limit a foreign investor's exposure to retaliatory countermeasures imposed because its home country refuses to comply with WTO obligations.<sup>63</sup>

The third significant example of parallel proceedings involves the recent filing of WTO and BIT claims relating to Australia's Tobacco Plain Packaging Act ("PPA").<sup>64</sup> The Australian legislation prohibits the branding of tobacco products and regulates almost every aspect of the appearance, size and shape of tobacco packaging, with civil and criminal penalties for importing, packaging, or manufacturing non-compliant products.<sup>65</sup>

Such measures have prompted both trade and investment litigation. In the disputes now pending before the WTO, Ukraine, Honduras, and the Dominican Republic have argued, *inter alia*, that the PPA violated various TRIPs provisions by (1) unjustifiably encumbering the use of a trademark by special requirements, (2) preventing owners from enjoying the rights conferred by trademark, and (3) failing to provide effective protection against unfair competition with respect to geographic indications.<sup>66</sup>

Meanwhile, Philip Morris has brought a BIT claim against Australia alleging the PPA constitutes an unlawful expropriation of its intellectual property, violates fair and

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62. Archer Daniels Midland v. United Mexican States, ICSID Case No. ARB(AF)/04/05, ¶¶ 128-151 (Sept. 26, 2007); Corn Products International, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/04/01, ¶¶ 144-191 (Jan. 15, 2008); Cargill, Inc. v. Mexico, Case No. ICSID ARB(AF)/05/2, ¶¶ 379-428 (Aug. 13, 2009). *See generally* N. Jansen Calamita, *Countermeasures and Jurisdiction: Between Effectiveness and Fragmentation*, 42 GEO. J. INT'L L. 233, 246-253 (2011).
  63. Luke Eric Peterson, *Countermeasures Defence Raised in NAFTA Chapter 11 Claims Against Mexico*, INTERNATIONAL ECONOMIC LAW AND POLICY BLOG, <http://worldtradelaw.typepad.com/ielpblog/2009/04/countermeasures-defence-raised-in-nafta-chapter-11-claims-against-mexico.html> (Apr. 13, 2009).
  64. *Tobacco Plain Packaging Act 2011*, (Austl.).
  65. *Id.*
  66. Request for Consultation by Honduras, *Australia—Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435/1 (Apr. 10, 2012); Request for Consultation by Honduras, *Australia—Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435/1 (Apr. 10, 2012); Request for Consultation by Ukraine, *Australia—Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS/434/1 (Mar. 15, 2012).

equitable treatment, guarantees of full protection and security, and umbrella clause guarantees.<sup>67</sup> Australia, not surprisingly, denies the allegations.<sup>68</sup>

While these international proceedings are ongoing, the tobacco industry has launched a third avenue of attack by pursuing litigation in Australian courts. The Australian Supreme Court has already weighed in regarding the constitutionality of the PPA, finding that “the mere restriction on a right of property or even its extinction do not necessarily mean that a proprietary right has been acquired by another.”<sup>69</sup>

Trade and investment tribunals must now determine whether their rules protecting intellectual property rights can accommodate exceptions for health and public safety.<sup>70</sup> The WTO Agreements incorporate general exceptions necessary to protect human health and safety, but the Hong Kong-Australia BIT includes no such exception.<sup>71</sup> The evidence to support the government’s health claims also will be tested, with the scientific standards in investment arbitration uncertain, while the WTO imposes stringent scientific standards to establish that plain packaging demonstrably alters consumer behavior.<sup>72</sup>

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67. Philip Morris Asia Ltd. v. Australia, Notice of Arbitration (Perm. Ct. Arb. Nov. 21, 2011), <http://italaw.com/sites/default/files/case-documents/ita0665.pdf>.
68. Philip Morris Asia Ltd. v. Australia, Australia’s Response to the Notice of Arbitration, (Perm. Ct. Arb. Dec. 21, 2011), <http://italaw.com/sites/default/files/case-documents/ita0666.pdf>.
69. *JT International SA v. Commonwealth* [2012] HCA 43, ¶ 357 (Austl.), available at <http://www.austlii.edu.au/au/cases/cth/HCA/2012/43.html>.
70. For a discussion of the likely success of the WTO case, see Tania S. Voon and Andrew D. Mitchell, *Implications of WTO Law for Plain Packaging of Tobacco Products*, in PUBLIC HEALTH AND PLAIN PACKAGING OF CIGARETTES LEGAL ISSUES (A. Mitchell, T. Voon, and J. Liberman, eds. 2012); Memorandum from Lalive to Philip Morris International Management SA (Jul. 23, 2009), {available at [http://www.smoke-free.ca/plain-packaging/documents/industry-responses/LALIVE\\_Analysis\\_23\\_July\\_2009.pdf](http://www.smoke-free.ca/plain-packaging/documents/industry-responses/LALIVE_Analysis_23_July_2009.pdf)}; DANIEL GERVAIS, ANALYSIS OF THE COMPATIBILITY OF CERTAIN TOBACCO PRODUCT PACKAGING RULES WITH THE TRIPS AGREEMENT AND THE PARIS CONVENTION (Nov. 30, 2010), <http://www.smoke-free.ca/trade-and-tobacco/Resources/Gervais.pdf>. For a discussion of the likely success of Philip Morris’ investment arbitration claim, Benn McGrady, *Implications of Ongoing Trade and Investment Disputes Concerning Tobacco: Philip Morris v. Uruguay*, in PUBLIC HEALTH AND PLAIN PACKAGING OF CIGARETTES LEGAL ISSUES (A. Mitchell, T. Voon, and J. Liberman, eds. 2012)); Luke Nottage, *Consumer Product Safety Regulation and Investor-State Arbitration Policy and Practice After Philip Morris Asia v. Australia*, 22 AUSTL. PRODUCTS LIABILITY REP. 154 (2011), available at [http://sydney.edu.au/law/scil/documents/2011/WP29\\_Nottage\\_Investor\\_APLR2011.pdf](http://sydney.edu.au/law/scil/documents/2011/WP29_Nottage_Investor_APLR2011.pdf).
71. Compare General Agreement on Tariffs and Trade 1994 art. XX(b), Apr. 15, 1994, 1867 U.N.T.S. 187, 33 I.L.M. 1153 [hereinafter GATT 1994] GATS art. XIV; TRIPs art. 20; H.K.-Austl Bilateral Investment Treaty, Sept. 15, 1993, available at [http://www.legislation.gov.hk/IPPAustraliae.PDF](http://www.legislation.gov.hk/IPPAAustraliae.PDF).
72. Regarding the disputed science behind plain packaging, compare compare Melanie Wakefield, et. al., *Do Larger Pictorial Health Warnings Diminish the Need for Plain Packaging of Cigarettes*, 107 ADDICTION 1159 (2012) with Christopher Snowdown, *Plain Packaging: Commercial Expression, Anti-Smoking Extremism, and the Risks of Hyper-Regulation*, 13-22 (2012), <http://www.adamsmith.org/research/reports/plain-packaging>.



Parallel proceedings in the plain packaging context illustrate a willingness by multinational corporations to pursue all possible avenues of relief in response to onerous government regulation. Trade and investment litigation is a key part of that strategy. Philip Morris restructured its investment to capitalize on Hong Kong-Australia BIT protections, with Hong Kong-based Philip Morris Asia acquiring its interest in Philip Morris Australia in February 2011 after the plain packaging dispute arose.<sup>73</sup> It also engaged in “diplomatic espousal shopping,” with the tobacco industry searching the globe for countries willing to initiate a WTO proceeding on its behalf, and funding countries like Ukraine, which has not exported tobacco to Australia in years, to litigate the WTO complaint.<sup>74</sup> At a minimum litigation before international trade and investment tribunals may cause countries such as the EU, Canada and New Zealand to delay adopting their own plain packaging measures. It also could increase the transaction costs of tobacco legislation. It also could increase the transaction costs of tobacco legislation. In the absence of *stare decisis* and non-mutual collateral estoppel in either trade litigation or investment arbitration, the tobacco industry can relitigate the same question again and again as each additional country adopts plain packaging legislation.

## V. Trade Remedies to Enforce Arbitration Awards

One of the most significant developments signaling the convergence of trade and arbitration is the use of trade remedies to enforce arbitration awards. This is done primarily when a developed country threatens to remove preferential trade benefits to a developing country if that country does not honor its international arbitration commitments.

The WTO allows (but does not require) developed countries to grant preferential trade benefits to “promote the development, financial and trade needs of developing countries.”<sup>75</sup> Many developed countries—including Australia, Canada, the European Union, and the United States—have established such “Generalized System of Preferences” or GSPs to promote trade with developing countries.<sup>76</sup> The major benefit of

73. Philip Morris Asia Ltd. v. Australia, Australia’s Response to the Notice of Arbitration, (Dec. 21, 2011), ¶¶ 29-31 <http://italaw.com/sites/default/files/case-documents/ita0666.pdf>.

74. Tim Colebatch, *Plain Packaging Challenge Spreads*, THE SYDNEY MORNING HERALD, Jul. 20, 2012; Christopher Thompson, *Big Tobacco Backs Australian Law Opposers*, FINANCIAL TIMES, Apr. 29, 2012.

75. This exception to normal Most-Favored-Nation status is pursuant to the so-called Enabling Clause adopted by GATT Contracting Parties in 1980 and carried forward with GATT 1994. See Decision of the Panel, *Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries*, L/4903 (Nov. 28 1979), GATT B.I.S.D. (26th Supp.) at 203, art. 3(c), (1980); GATT 1994 para. 1(b)(iv) consists, inter alia, of other decisions of the Contracting Parties to GATT 1947).

76. See UNCTAD, *Generalized System of Preferences* (2012), <http://unctad.org/en/Pages/DITC/GSP/Generalized-System-of-Preferences.aspx>.

GSP schemes is the unilaterally lowering of tariff bowers for products from beneficiary countries without a corresponding reduction in tariffs for the developed country's products.

The discretionary nature of these schemes means that the trade benefits come with strings attached. In the United States and the European Union, for example, developing countries are subject to performance obligations with respect to matters such as drug trafficking, international terrorism, democracy, human rights, environmental protection, government corruption, unlawful expropriation, the rule of law, and good governance.<sup>77</sup>

The United States imposes a number of conditions on beneficiary countries, including that they recognize and enforce arbitral awards in favor of United States nationals.<sup>78</sup> Any country that wishes to secure beneficiary status under the GSP scheme must satisfy this criterion,<sup>79</sup> and any country that fails to maintain this commitment jeopardizes their beneficiary status. The provision was added to the Trade Act of 1974<sup>80</sup> because of concerns that it was "contrary to sound U.S. policy to give...any... developing nation the favored treatment contemplated by the present legislation in the face of unwillingness to abide by solemn agreements to recognize as final and binding arbitration awards rendered in disputes between it and American parties."<sup>81</sup>

The use of trade remedies to enforce arbitration awards is best illustrated by the ongoing dispute over Argentina's refusal to honor adverse investment awards. On March 26, 2012, the Obama Administration announced that Argentina's GSP beneficiary designation would be suspended "because it has not acted in good faith in enforcing arbitral awards in favor of United States citizens."<sup>82</sup> It was the first time in American

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77. See, e.g., Trade Act of 1974 § 502, 19 U.S.C. § 2462 (2006) (enumerating criteria for designation as a GSP beneficiary status); EU Council Regulation 978/2012, art. 9, 2012 O.J. (L 303) 1 (EC) (establishing criteria for designation as beneficiary country based on commitments to human rights, the environment, drug-trafficking, and corruption).
78. 19 U.S.C. § 2462(b)(2)(E) (2006) ("The President shall not designate any country a beneficiary developing country under this subchapter if ... such country fails to act in good faith in recognizing as binding or in enforcing arbitral awards in favor of United States citizens or a corporation, partnership, or association ... which have been made by arbitrators appointed for each case or by permanent arbitral bodies to which the parties involved have submitted their dispute."); see also 19 U.S.C. § 2702(a)(3) (2006) (same requirement with respect to benefits under the Caribbean Basin Initiative); 19 U.S.C. § 3202(3) (2006) (same requirement with respect to benefits under the Andean Trade Preference Act).
79. See, e.g., Generalized System of Preferences (GSP); Initiation of a Review to Consider the Designation of Nigeria as a Beneficiary Developing Country Under the GSP; Solicitation of Public Comments relating to the Designation Criteria, 65 Fed. Reg. 25972 (May 4, 2000); Generalized System of Preferences (GSP); Initiation of a Review to Consider the Designation of Mongolia as a Beneficiary Developing Country Under the GSP; Solicitation of Public Comments relating to the Designation Criteria, 64 Fed. Reg. 3736 (Jan. 25, 1999).
80. TRADE ACT OF 1974, CONFERENCE REPORT, H. REP. NO. 93-1644, at 52-53 (Dec. 19, 1974).
81. 120 CONG. REC. 39,831 (Dec. 13, 1974) (statement of Sen. Robert Taft); see generally Charles B. Rosenberg, *The Intersection of International Trade and International Arbitration: The Use of Trade Benefits to Secure Compliance with Arbitral Awards*, 44 GEO. J. INT'L L. 503 (2013).
82. To Modify Duty-Free Treatment Under the Generalized System of Preferences and for Other

history the United States denied GSP trade benefits to a developing country for its failure to honor arbitration commitments.<sup>83</sup> “A remarkable achievement,” is how one senior USTR official described the development.<sup>84</sup>

The decision was the culmination of an intense lobbying effort by American corporations who had succeeded in arbitration against Argentina pursuant to the United States-Argentina Bilateral Investment Treaty, but were unsuccessful in securing enforcement of those awards.<sup>85</sup> The threat to suspend GSP benefits became a matter of intense bilateral concern. When President Barack Obama and Argentine President Christine Fernandez met for the first time in November 2011, the two heads of state spent the majority of their time discussing Argentina’s obligation to pay the arbitration awards, and the consequences that would flow from its failure to do so.<sup>86</sup>

The United States is clearly calculating that such trade sanctions will alter Argentina’s cost-benefit analysis.<sup>87</sup> Buenos Aires is set to pay approximately \$18 million annually in increased duties as a result of the GSP suspension, far below the \$300 million it owes from the arbitration awards.<sup>88</sup> Standing alone, the GSP suspension may be an insufficient incentive to comply given that the annual cost in additional duties

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Purposes, Proclamation No. 8788, 77 Fed. Reg. 18,899 (Mar. 26, 2012).

83. US Suspends Special Tariffs for Argentina, BBC NEWS, (Mar. 26, 2012, 13:23 ET), <http://www.bbc.co.uk/news/business-17517838>.
84. Jonathan S. Kallmer, former Deputy Assistant U.S. Trade Representative for Investment, Using International Trade Law to Enforce International Arbitration Awards, (Nov. 29, 2012), [http://www.dcbat.org/for\\_lawyers/events/details.cfm?eventCD=121310IDR](http://www.dcbat.org/for_lawyers/events/details.cfm?eventCD=121310IDR).
85. GSP: 2009 ANNUAL REVIEW, Petition for Review of the Republic of Argentina’s Eligibility under GSP by Azurix Corp. (Dec. 4, 2009) available at <http://www.ustr.gov/trade-topics/trade-development/preference-programs/generalized-system-preference-gsp/current-review-1>; GSP: 2010 ANNUAL REVIEW, Petition for the Withdrawal of the Application of Duty-Free Treatment to Articles of Argentina by Blue Ridge Investments, L.L.C. (June 23, 2010) available at <http://www.ustr.gov/node/6058>; see generally Nigel Blackaby, Partner, Freshfields Bruckhaus Deringer, Using International Trade Law to Enforce International Arbitration Awards, (Nov. 29, 2012), [http://www.dcbat.org/for\\_lawyers/events/event\\_Detail.cfm?eventCD=121310IDR&isPackage=0&showAllButtons=1](http://www.dcbat.org/for_lawyers/events/event_Detail.cfm?eventCD=121310IDR&isPackage=0&showAllButtons=1).
86. Daniel Restrepo, Remarks at the University of Pennsylvania School of Law Symposium (Nov. 2, 2012) (<https://www.law.upenn.edu/journals/jil/agenda2012.php>); *US: Obama-CFK Meeting “Warm,” but Argentina Must Cancel Debt*, BUENOS AIRES HERALD (Nov. 9, 2011) available at <http://www.buenosairesherald.com/article/84136/us-calls-obamacfk-meeting-warm-but-says-argentina-must-cancel-debt>.
87. Press Release, U.S. Trade Representative Ron Kirk, Comments on Presidential Actions Related to the Generalized System of Preferences, Office of the United States Trade Representative (Mar. 2012) available at <http://www.ustr.gov/about-us/press-office/press-releases/2012/march/us-trade-representative-ron-kirk-comments-presidenti> (expressing the hope that Argentina would pay the awards, allowing “us to consider reinstating Argentina’s eligibility and promote the growth of a mutually beneficial U.S.-Argentina trade and investment relationship.”).
88. Doug Palmer, *Obama Says to Suspend Trade Benefits for Argentina*, REUTERS, (Mar. 26, 2012, 3:40 PM), <http://www.reuters.com/article/2012/03/26/us-usa-argentina-trade-idUSBRE82PQX20120326>; *United States Suspends Special Tariffs for Argentina*, BBC NEWS, (Mar. 26, 2012 13:23 ET) <http://www.bbc.co.uk/news/business-17517838>.

represents only six percent of one arbitration award. But when the trade sanctions are considered in the context of other measures—such as limiting access to World Bank and Inter-American Development Bank credit and loan facilities or refusing to support the restructuring of Argentina's \$7 billion Paris Club debt—the combined result may nudge Argentina toward compliance, or at least a post-award settlement.<sup>89</sup> The combined approach exposes Argentina to substantial risks, such as limiting its access to credit, altering its credit rating, constricting its export market, and discouraging foreign investment.

With the successful campaign to suspend Argentina's GSP benefits, U.S. corporations are now actively pursuing a similar tactic with respect to other countries. Chevron, in particular, is lobbying the United States Trade Representative to suspend Ecuador's preferential trade status under the Andean Trade Preference Act ("ATPA")<sup>90</sup> because of that country's failure to honor arbitration awards in Chevron's favor. USTR has warned that Ecuadorian President Rafael Correa that he is in jeopardy of losing ATPA beneficiary status.<sup>91</sup> Ecuador is particularly vulnerable to losing its beneficiary status because the other three ATPA beneficiary countries have already, or soon will no longer be part of the program.<sup>92</sup> The ATPA is unlikely to remain with Ecuador as the sole beneficiary.<sup>93</sup>

Thus far proposed trade remedies to enforce arbitration awards have come in the modest form of removing preferential trade benefits. If that approach proves unsuccessful, the United States could consider more drastic measures—such as Section 301 trade remedies.<sup>94</sup> In 2011 Azurix filed a Section 301 petition, arguing that Argentina's refusal to pay the ICSID award constitutes an unjustifiable measure that burdens U.S. commerce within the meaning of Section 301.<sup>95</sup>

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89. Rosenberg, *supra* note 81, at 517; Jorge E. Viñuales & Dolores Bentolila, *The Use of Alternative (Non-Judicial Means) to Enforce Investment Awards Against States*, in DIPLOMATIC AND JUDICIAL MEANS OF DISPUTE SETTLEMENT (L. Boisson de Chazournes, et al. eds., 2012).

90. Andean Trade Preference Act, 19 U.S.C. §§ 3201-3206.

91. United States Trade Representative, *Sixth Report to the Congress on the Operation of the Andean Trade Preferences Act as Amended*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE 25 (June 30, 2012), [http://www.ustr.gov/webfm\\_send/3488](http://www.ustr.gov/webfm_send/3488).

92. Bolivia lost its beneficiary status in 2009, Peru graduated from the program in 2010, and Colombia will no longer be part of the program with the entry into force of the United States-Colombia Trade Program Agreement Implementation Act. See Proclamation No. 8323, 73 Fed. Reg. 72,677 (Nov. 25, 2008) (removing Bolivia as an ATPA beneficiary country); Andean Trade Preference Act (ATPA): Notice Regarding the 2012 Annual Review, 77 Fed. Reg. 47,910 (Aug. 10, 2012) ("[a]s of May 15, 2012, with the entry into force of the CTPA [United States-Colombia Trade Program Agreement Implementation Act], only Ecuador remained eligible for benefits under the program"); See Restrepo, *supra* note 86; Rosenberg, *supra* note 81, at 528-29.

93. Restrepo, *supra* note 86.

94. 19 U.S.C. § 2411 (regarding the consistency of Section 301 trade remedies with the WTO); Panel Report, *United States—Sections 301-310 of the Trade Act of 1974*, WT/DS152/R (Dec. 22, 1999).

95. *U.S. Firm Readies Section 301 Petition To Collect ICSID Award From Argentina*, INSIDE US

The USTR has been reluctant to accept Section 301 petitions when an investor alleges that a host country has expropriated its investment, reasoning that such claims should be pursued in investment arbitration.<sup>96</sup> But if an investor successfully pursues arbitration and still is unable to collect against the host country, the justification for pursuing a Section 301 action is enhanced.<sup>97</sup> The overwhelming majority of Section 301 cases are concerned with foreign trade practices that impede exports or impose impediments to U.S. investments abroad.<sup>98</sup> Section 301 measures almost always are designed with the same objectives as bilateral investment treaties: to benefit the U.S. economy by promoting trade, foreign investment and export opportunities. Therefore, a Section 301 action for refusing to recognize and enforce an arbitration award is plausible.

It is also possible that the United States could consider more draconian unilateral remedies to pressure Argentina to comply with its obligations. Such measures may include seizing assets, denying access to capital markets, imposing import bans, or retaliatory tariffs against Argentine products. For example, proposed legislation in the 112<sup>th</sup> Congress would have required the Securities and Exchange Commission to take all necessary measures to deny any “judgment evading foreign state” or state-owned corporation thereof from access to United States capital markets, including the ability to borrow money or sell securities in the United States.<sup>99</sup> The purpose of such legislation, according to its principal sponsor, was stop Argentina—“one of the largest scofflaws in history” that shows “equal disregard for both U.S. and international law”—from “inflicting further financial injury on the United States and its citizens.”<sup>100</sup>

To the extent such measures would violate WTO trade rules—by imposing discriminatory internal regulations—the United States could argue that they are permitted under a WTO general exception. Article XX(d) of the GATT 1994 allows Member States to take measures that are “necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement....”<sup>101</sup> The

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TRADE (Aug. 12, 2011), [http://wtonewsstand.com/component/option,com\\_ppv/Itemid,445/id,2372728/](http://wtonewsstand.com/component/option,com_ppv/Itemid,445/id,2372728/); Doug Palmer, *U.S. Firm Eyes Trade Case to Enforce Argentina Payment*, REUTERS, (Aug. 8, 2011 5:48 PM) <http://www.reuters.com/article/2011/08/08/usa-argentina-dispute-idUSN1E7770XN20110808>; Arthur E. Appelon, *Forum Selection in Trade Litigation*, ICTSD PROGRAMME ON INTERNATIONAL TRADE LAW (April 2013), <http://ictsd.org/downloads/2013/04/forum-selection-in-trade-litigation.pdf>.

96. Petition Under 302 on Alleged Expropriations by the Dominican Republic, 76 Fed. Reg. 41,857 (July 15, 2011).

97. See Kallmer, *supra* note 84.

98. Alan O. Sykes, *Constructive Unilateral Threats in International Commercial Relations: The Limited Case for Section 301*, 23 L. & POL'Y INT'L BUS. 263, 264-65 (1992).

99. S. 912, 112th Cong. (1st Sess. 2011); H.R. 1798, 112th Cong. (1st Sess. 2011).

100. Rep. Connie Mack, *U.S., Obama Must Hold Argentina Accountable*, ROLL CALL, (Nov. 9, 2011), [http://www.rollcall.com/issues/57\\_56/connie\\_mack\\_us\\_obama\\_must\\_hold\\_argentina\\_accountable-210136-1.html](http://www.rollcall.com/issues/57_56/connie_mack_us_obama_must_hold_argentina_accountable-210136-1.html).

101. GATT, Art. XX(d). See Appellate Body Report, *Korea- Measures Affecting Imports of Fresh, Chilled, and Frozen Beef*, ¶157, WT/DS161/AB/R (Dec. 11, 2000) (“[f]or a measure, otherwise

WTO would not permit a measure that simply sought Argentina's compliance with its ICSID obligations.<sup>102</sup> The "laws or regulations" contemplated by Article XX(d) refers to "rules that form part of the domestic legal system of a WTO member," not "obligations of another WTO member under an international agreement."<sup>103</sup> To the extent ICSID awards are part of domestic United States law, measures necessary to secure such compliance with those awards would arguably fall within Article XX(d).

Federal legislation implementing the ICSID Convention provides that an ICSID award "shall create a right arising under a treaty of the United States" and that the "pecuniary obligations imposed by such an award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States."<sup>104</sup> Thus, ICSID awards become enforceable domestic judgments in the United States by virtue of 22 U.S.C. § 1650a. Accordingly, compliance with an ICSID award is not simply a question of international law; it is also a matter of federal law placing ICSID awards on the same footing as domestic court judgments.

If the United States takes WTO-inconsistent action to pressure Argentina into compliance, it can credibly argue that enforcement of judgments is a legitimate state objective and that, having failed to collect on the judgments using alternative means, unilateral trade measures are necessary to secure compliance with WTO-consistent federal law.

## **VI. Investment Arbitration to Enforce Trade Obligations**

Recourse to trade remedies to pursue the enforcement of arbitration awards is a present reality. In the future, the convergence of trade and arbitration may include recourse to investment arbitration to enforce international trade guarantees. Specifically, umbrella clauses in bilateral investment treaties are being invoked to enforce investment commitments in trade agreements.

There is extensive commentary on the meaning of umbrella clauses in BITs, with particular focus on whether contract rights give rise to investment claims.<sup>105</sup> Less

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inconsistent with GATT 1994, to be justified provisionally under paragraph (d) of Article XX, two elements must be shown. First, the measure must be one designed to 'secure compliance' with laws or regulations that are not themselves inconsistent with some provision of the GATT 1994. Secondly, the measure must be 'necessary' to secure such compliance.").

102. Appellate Body Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, ¶69, WT/DS308/AB/R (Mar. 6, 2006).

103. *Id.*

104. 22 U.S.C. § 1650a.

105. See, e.g., JAN OLE VOSS, *THE IMPACT OF INVESTMENT TREATIES ON CONTRACTS BETWEEN HOST STATES AND FOREIGN INVESTORS* 221-276 (2011); JESWALD W. SALACUSE, *THE LAW OF INVESTMENT TREATIES*, 271-284 (2010); STEPHAN W. SCHILL, *Umbrella Clauses as Public Law Concepts in Comparative Perspective*, in *INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW* 317

common in the scholarly literature is whether a State's other investment commitments give rise to a BIT claim.<sup>106</sup> There is virtually no discussion as to whether WTO commitments, including provisions of the TRIMs Agreement, constitute an investment obligation within the meaning of BIT umbrella clauses.

The scope of umbrella clauses is dependent on the language in particular BITs, which varies widely from one treaty to the next. Accordingly, there is no uniform understanding as to the meaning of umbrella clauses. Narrow umbrella clauses are unlikely vehicles for vindicating international trade rights. A treaty commitment to observe any obligation a Contracting State "has assumed with regard to specific investments" is unlikely to encompass legislative measures or treaty commitments.<sup>107</sup> Broad umbrella clauses, by contrast, committing a Contracting Party to observe any obligation it may have entered into with regard to investments are better candidates.<sup>108</sup>

ICSID tribunals have interpreted broad umbrella clauses to give investors treaty rights with respect to unilateral undertakings of the State embodied in municipal law.<sup>109</sup> In *CMS Gas Transmission Co. v. Argentina*, the tribunal concluded that utility tariffs designed to attract foreign investment were "legal ... obligations pertinent to the investment."<sup>110</sup> In *LGE v. Argentina*, the tribunal concluded that abrogation of

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(Stephan W. Schill, ed. 2010); *Clauses as Public Law Concepts in Comparative Perspective*, in INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW, 317 (Stephan W. Schill, ed. 2010); MONIQUE SASSON, SUBSTANTIVE LAW IN INVESTMENT TREATY ARBITRATION: THE UNSETTLED RELATIONSHIP BETWEEN INTERNATIONAL AND MUNICIPAL LAW 173-194 (2010); ANDREW NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 436-478 (2009); RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 153, 162 (2008); Jarrod Wong, *Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide between Developing and Developed Countries in Foreign Investment Disputes*, 14 GEO. MASON L. REV. 135 (2006).

106. NEWCOMBE & PARADELL, *supra* note 105, at 456-459; SASSON, *supra* note 105, at 193-94; MARÍA CRISTINA GRITÓN SALIAS, *Do Umbrella Clauses Apply to Unilateral Undertakings*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 490 (Christina Binder et al., eds. 2009).
107. For example, in *SGS v. Philippines* an ICSID tribunal interpreted the language of the Switzerland-Philippines BIT, which required each Contracting Party to "observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party," as limited to specific contractual commitments rather than legal obligations of a general character. See, *SGS Societe Generale de Surveillance S.A. v. Republic of the Phil.*, ICSID Case No. ARB/02/6, ¶115-126, (Jan. 29, 2004).
108. *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, Art.II, (Oct. 12, 2005) (interpreting the United States-Romania BIT, which provides that "[e]ach Party shall observe any obligation it may have entered into with regard to investments."); *Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, (Apr. 6, 2003) (interpreting Switzerland-Pakistan BIT, which provides that "[e]ach Contracting Party shall constantly guarantee the observance of commitments it has entered into with respect to the investments or the investors of the other Contracting Party.").
109. NEWCOMBE & PARADELL, *supra* note 105, at 456-459.
110. *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, ¶303 (May 12, 2005).

guarantees made to investors in a statutory framework gave rise to liability under the umbrella clause.<sup>111</sup> In *Enron v. Argentina*, another tribunal concluded that the umbrella clause referred to “any obligations regardless of their nature.”<sup>112</sup> This included not only contractual obligations, but also “obligations assumed through law or regulation” that are “with regard to investments.”<sup>113</sup> In *Sempra Energy International v. Argentina*, a tribunal found that major legal and regulatory changes introduced by the State as part of its public function constituted treaty violations under the umbrella clause.<sup>114</sup> Finally, in *SGS v. Paraguay*, a tribunal interpreted a broad umbrella clause as creating “an obligation for the State to constantly guarantee observance of its commitments entered into with respect to investments of investors of the other party. The obligation has no limitations on its face—it apparently applies to all such commitments, whether established by contract or by law, unilaterally or bilaterally.”<sup>115</sup>

Note that these sweeping pronouncements do not require that a State’s commitment reference a specific investment or contract. As long as legislative or executive measures relate to the promotion or regulation of investments, they constitute unilateral undertakings covered by a broad umbrella clause. Such ICSID jurisprudence has led one commentator to conclude that “tribunals overwhelmingly accept the application of umbrella clauses to obligations assumed unilaterally by host States,” whether those undertakings are “made through legislation or otherwise.”<sup>116</sup> Another has opined that “the current tide of jurisprudence concerning umbrella clauses is in favor of such clauses encompassing host State commitments of all kinds.”<sup>117</sup>

Assuming such interpretations are correct—which is by no means clear—this has significant implications for the WTO. If WTO obligations are subject to investment arbitration, it would authorize private parties to initiate trade cases. Private rights of action through investment arbitration would supplement the diplomatic espousal of claims before the WTO.

This is precisely what one foreign investor has argued with respect to alleged WTO violations as a result of Australia’s plain-packaging laws. On November 21, 2011, Philip Morris Asia Ltd. filed an investment arbitration claim against Australia pursuant to the

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111. LG&E Energy Corp., LG&E Capital Corp. and LG&E Int’l Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, ¶175 (Oct. 3, 2006).

112. Enron Corp. Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award, ¶274 (May 22, 2007).

113. *Id.*

114. Sempra Energy Int’l v. Argentine Republic, ICSID Case No. ARB/02/16, Award, ¶310-313 (Sept. 28, 2007).

115. Société Générale de Surveillance S.A. v. Republic of Paraguay, ICSID Case No. ARB/07/29, Award ¶167 (Feb. 12, 2012).

116. Salas, *supra* note 106, at 495.

117. Darius Chan, *The High-Water Mark of an Umbrella Clause: SGS v. Paraguay*, KLUWER ARBITRATION BLOG (Apr. 18, 2012), <http://kluwerarbitrationblog.com/blog/2012/04/18/the-high-water-mark-of-an-umbrella-clause-sgs-v-paraguay/>.



Hong Kong-Australia Bilateral Investment Treaty. The central contention of Philip Morris is that Australia's plain packaging legislation violated various international obligations. Among the claims it filed is one under the broad "umbrella clause" in the BIT, which provides that "[e]ach Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party."<sup>118</sup> According to the Notice of Arbitration:

This [umbrella clause] obligation is broader than specific obligations ... made by the host State to investors.... It also encompasses other international obligations binding on the host State that affect the way in which property is treated in Australia.... [T]he relevant obligations are those enshrined in TRIPS, the Paris Convention, and TBT. [Claimant] as an owner of the investments is entitled to expect Australia to comply with its obligations pursuant to those treaties. By adopting and implementing plain packaging legislation, Australia has failed to observe and abide by those obligations."<sup>119</sup>

In response, Australia argued that:

The meaning and scope of such provisions is a matter of great controversy. However it is clear in the instant case that ... the "umbrella clause" in Article 2(2) cannot be understood as encompassing general obligations in multilateral treaties.... Rather ... the "umbrella clause" ... only covers commitments that a host State has entered into with respect to specific investments.... [T]he obligations under the multilateral treaties ... are not "obligations" which have been entered into with regard to investments of investors" of Hong Kong, but are rather obligations that operate on the inter-State level, with their own particular inter-State dispute resolution procedures.<sup>120</sup>

It is too early to assess the likely success of such claims, but if the recent "umbrella clause" jurisprudence is accurate the claims are at least colorable.

Whether WTO commitments are obligations with regard to investments is a difficult question. At one level, the entire WTO regime is intended, according to the Marrakesh Declaration, to "lead to more ... investment ... throughout the world."<sup>121</sup> Therefore virtually all WTO commitments will influence investment climates and investor decisions in some form.<sup>122</sup> At another level, one can identify specific WTO commitments in TRIMs,

118. Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments, H.K.-Austl., Sept. 15, 1993, 1770 U.N.T.S. 386, available at <http://www.legislation.gov.hk/IPPAustraliae.PDF>.

119. Philip Morris Asia Ltd. v. Australia, Notice of Arbitration, ¶¶ 7.15-7.17 (Perm. Ct. Arb. Nov. 21, 2011), <http://italaw.com/sites/default/files/case-documents/ita0665.pdf>.

120. Philip Morris Asia Ltd. v. Australia, Australia's Response to the Notice of Arbitration, ¶¶ 57-58 (Perm. Ct. Arb. Dec. 21, 2011), <http://italaw.com/sites/default/files/case-documents/ita0666.pdf>.

121. Marrakesh Agreement Establishing the World Trade Organization, art.1 Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement].

122. Pierre Sauvé, *A First Look at Investment in the Final Act of the Uruguay Round*, in GLOBALIZATION AND INTERNATIONAL INVESTMENT, 241, 242, n.1 (Fiona Beveridge ed., 2005).

TRIPs, and GATs that provide significant investment protections.<sup>123</sup> To the extent that umbrella clause commitments extend to unilateral investment undertakings, at least some WTO commitments implemented in domestic legislation would satisfy the investment nexus.

This potential convergence of trade and arbitration has profound implications for the resolution of WTO violations. An arbitration panel liberally construing a broad umbrella clause could transform how WTO obligations are adjudicated. How would the adjudication of WTO obligations through investment arbitration alter the landscape?

First, umbrella clauses in BITs could create a private right of action for resolving WTO disputes. Investment arbitration circumvents the traditional barriers to initiating a WTO dispute. Diplomatic espousal is no longer a reliable check on the pursuit of unmeritorious claims. Through umbrella clauses foreign investors could seek recourse for violations of investment obligations that form part of WTO disciplines.

Second, with WTO dispute settlement the Member States control all decisions with respect to adjudication and resolution of the dispute. Investors may prefer an alternative dispute settlement process that places such decisions within their control. The incentives to settle an investment dispute depend on satisfying investors concerns rather than satisfying the disputing Member States' concerns.

Third, with limited exceptions, the WTO prohibits unilateral trade remedies. Article 23 of the DSU provides that Member States "shall not make a determination to the effect that a violation has occurred ... except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding."<sup>124</sup> Investment arbitration is not a unilateral remedy imposed in response to a WTO violation, but neither is it WTO dispute settlement. Investment arbitration may provide a vehicle for compensating or attenuating the harm caused to investors without offending the WTO restrictions on unilateral trade remedies.

Fourth, WTO remedies are prospective, while investment arbitration remedies may be retroactive. The goal of the WTO adjudication is to bring Member States into conformity with their trade obligations.<sup>125</sup> The goal of investment arbitration is, consistent with traditional understandings of state responsibility, to "wipe-out all the consequences of

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123. TRIMs prohibits any Member State from applying any investment measures in a manner that violates national treatment or quantitative restrictions. TRIPs enhances the protection afforded to firms investing in goods and services that are IP intensive. GATs protects cross-border supply of services, cross-border movement of consumers and suppliers, and the commercial presence of service providers. *Id.* at 243-250. As such, the WTO marks "an important watershed in international rule-making by subjecting investment-related issues for the first time to the logic and disciplines of multilateral trade diplomacy." *Id.* at 241.

124. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 23(2)(a), Apr. 15, 1994 Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

125. DSU art. 19(1), 22.

the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.”<sup>126</sup>

Fifth, under the WTO dispute settlement process, any losses an investor suffers as a result of a Member State’s WTO violation are not compensable. WTO remedies contemplate compensation directly to a Member State or, failing that, the suspension of concessions paid directly to the Member State in the form of increased duties.<sup>127</sup> With investment arbitration, international law violations result in monetary compensation due directly to the investor.

Thus, liberal interpretations of broad umbrella clauses that encompass investment commitments in WTO undertakings may prove to be an attractive avenue for future investment arbitration.

## VII. Conclusion

The WTO and BITs are among the most significant legal developments in the history of international economic law. Never before in the history of international relations has trade and investment been supported by such powerful legal guarantees and adjudicative processes. In less than two decades the WTO and BITs have permanently altered the legal landscape with reciprocal and mutually advantageous arrangements designed to reduce barriers to trade and investment and eliminate discriminatory treatment in international economic relations.

In most respects the worlds of trade and investment are on parallel tracks headed in the same direction. The ends are similar, but the means toward those ends are distinct. The purpose of this essay has been to highlight discrete areas where a convergence of the two disciplines is emerging. These points of convergence are limited, but significant.

The first point of convergence highlights the mutually reinforcing nature of trade and investment. The guarantees in BITs and the WTO are baseline protections that reflect international minimum standards that nations accord to every other trading partner. Preferential trade agreements with investment chapters promote deep vertical integration and efficient global production lines by minimizing trade costs, maximizing market access, and harmonizing cross-border regulatory standards. The convergence of trade and investment in deep PTAs is a reflection of the modern era of globalized chains of supply.

The second point of convergence emphasizes the unifying commitment in both trade and investment regimes against discrimination and protectionism. While the WTO

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126. *Factory at Chorzow (Ger. v. Pol.)* 1928 P.C.I.J. (ser. A) No. 17, at 47 (Sept. 13); *Draft Articles on Responsibility of States For Internationally Wrongful Acts*, [2001] 2 Y.B. Int’l L. Comm’n 1 U.N. Doc. A/CN.4/SER.A/2001 (“The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.”).

127. DSU art. 22.

focuses on non-discrimination with respect to like products and services, BITs focus on non-discrimination with respect to the regulation of similarly-situated foreign and domestic investors. Despite the textual differences, in no other area of law has WTO jurisprudence influenced the resolution of investment claims more than with respect to BIT national treatment guarantees.

Given the similarities between trade and investment guarantees, the same factual scenario may give rise to both WTO and BIT adjudication. Thus far we have seen such parallel proceedings in less than a handful of cases, but the proliferation of BITs and BIT investment arbitration will increase such opportunities. There is an obvious symmetry between the two types of proceedings, with one looking forward and the other looking backward.<sup>128</sup> It should surprise no one that multinational corporations will pursue investment claims before an arbitration forum created by States to promote the national interest, while States determine that it is in the national interest to pursue a parallel WTO claim.

The most innovative examples of the convergence between trade and arbitration are with respect to the last two developments, both of which suggest that the two regimes are mutually reinforcing. Investment arbitration was designed in a manner such that recognition and enforcement of adverse investment awards was presumed.<sup>129</sup> That is not how things have played out, and the Argentina kerfuffle suggests that foreign investors increasingly may pursue trade remedies to secure enforcement of investment arbitration awards. Conversely, the WTO was designed so that, with limited exceptions, trade disputes would be resolved before the WTO dispute settlement body. But liberal interpretations of broad umbrella clauses may afford foreign investors the opportunity to adjudicate investment commitments embedded in the WTO agreements before BIT tribunals. With these two developments we may see a future in which trade remedies reinforce investment guarantees, and investment remedies reinforce trade guarantees.

The broader implications of this convergence between trade and investment arbitration remain unclear. Much depends on the frequency with which these points of convergence occur. With one exception—preferential trade agreements with investment

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128. See Brooks E. Allen, *The Use of Non-Pecuniary Remedies in WTO Dispute Settlement: Lessons for Arbitral Practitioners*, in ASA SPECIAL SERIES NO. 30: PERFORMANCE AS A REMEDY: NON-MONETARY RELIEF IN INTERNATIONAL ARBITRATION, 281, 281 (Michael E. Schneider & Joachim Knoll eds., 2011).

129. See Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 53(1), Mar. 18, 1965, 17 U.S.T. 12709, 575 U.N.T.S. 159 [hereinafter ICSID Convention] (“The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.”). See also ICSID art. 54(1) (“Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.”).

chapters—convergence is an infrequent and occasional event. Investment tribunals occasionally have relied on WTO jurisprudence, but the WTO dispute settlement body almost never relies on investment tribunal jurisprudence.<sup>130</sup> Parallel trade and investment proceedings have occurred on only three occasions, even though there have been over 450 WTO complaints filed,<sup>131</sup> over 180 WTO panel reports issued,<sup>132</sup> and over 388 concluded or pending ICSID cases.<sup>133</sup> One cannot make too much of parallel proceedings if they occur in less than one percent of all trade or investment disputes. Recourse to trade remedies in order to enforce arbitration awards is a new development and only time will tell whether the Argentina scenario is *sui generis*. Foreign investors have relied on umbrella clauses to enforce investment commitments in trade agreements, but no investment tribunal has ruled to that effect.

The convergence of trade and investment has taken hold with investment chapters in preferential trade agreements. Convergence of the two disciplines with respect to dispute resolution is a nascent development. To the extent convergence occurs with greater frequency, we may soon call it a trend. Scholars today are actively encouraging broad and deep convergence of the two disciplines.<sup>134</sup> Perhaps further convergence will portend a future unified international economic law.<sup>135</sup>

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130. Roger Alford, *Does the WTO Rely on Investment Arbitration Awards as Persuasive Authority?*, KLUWER ARBITRATION BLOG (Sept. 27, 2012), <http://kluwerarbitrationblog.com/blog/2012/09/27/does-the-wto-rely-on-investment-arbitration-awards-as-persuasive-authority-2/>.
  131. *List of All WTO Complaints Brought Under the DSU*, WORLDTRADELAW.NET, (Jan. 7, 2013), [www.worldtradelaw.net](http://www.worldtradelaw.net) (article available through subscription or purchase).
  132. *WTO Panel Reports*, WORLDTRADELAW.NET, (Jan. 7, 2013), <http://www.worldtradelaw.net/reports/wtopanels/wtopanels.asp> (article available through subscription or purchase).
  133. Michael Waibel & Yanhui Wu, *Are Arbitrators Political?*, U. OF BONN (2012), <http://www.wipol.uni-bonn.de/lehrveranstaltungen-1/lawecon-workshop/archive/dateien/waibelwinter11-12>.
  134. Tomer Broude, *Investment and Trade: The "Lottie and Lisa" of International Economic Law, in TDM SPECIAL ISSUE: INTERSECTIONS: DISSEMBLANCE OR CONVERGENCE BETWEEN INTERNATIONAL TRADE AND INVESTMENT LAW*, 19 (Weiler ed., 2011) ("The regulation of trade and investment has been separated by historical and political reasons. These causes are no longer relevant, neither to economic theory nor to contemporary international economics. It makes little sense to continue the separation of trade and investment today. . . .").
  135. On the difficulty of finding a unified body of international economic law, see ANDREAS F. LOWENFELD, *INTERNATIONAL ECONOMIC LAW*, v (2nd ed. 2008) ("The problem in undertaking a project such as this one is not a lack of material, but rather . . . how to link the apparently diverse topics with some general concepts that serve to explain, guide, limit, and predict the development of an international economic law."); *Id.* at 927. ("One may ask, after exploring the many different subjects addressed in this volume, whether there is indeed an International Economic Law, a connection among the several strands. I believe there is, even if it is not capable of irrefutable proof."). On the difficulty of defining international economic law, see Steve Charnovitz, *What is International Economic Law?*, 14 J. INT'L ECON. L. 3, 3 (2011) ("[T]he meaning of [international economic law] remains contested. Indeed, I have not been able to find even two definitions that match.").

Finally, the convergence of trade and investment raises broader theoretical questions. Numerous actors have pursued the various convergences outlined in this essay: diplomats, bureaucrats, corporations, adjudicators, practitioners, and scholars. Typically they are not concerned with theoretical questions of global constitutionalism, fragmentation, incoherence, or cosmopolitan community. For them, international law is not a progressive, liberal project; it is a vehicle to solve real-world problems. How can we protect globalized chains of supply? How can we open foreign markets for our constituents? How should we interpret ambiguous text in a treaty? How can we secure compensation for past harm and prevent future harm? How can we exert sufficient economic pressure to force a recalcitrant party to recognize an award? How can we prevent a government from regulating away our intellectual property?

When actors seek to engage such problems, they are willing to use every tool available, regardless of the label. This practical reality raises important theoretical questions. International trade and investment law reflect institutional manifestations of structural bias, and a choice to pursue one avenue or the other creates path dependency. Defining a problem as a trade dispute or an investment dispute is a strategic decision, allowing the expert to refer to a “technical idiom so as to open the door for applying the expertise related to that idiom, together with the attendant structural bias.”<sup>136</sup> Powerful interest groups will attempt to define the problem in a way that furthers their interests, and will invoke whatever language is necessary. Fragmentation and convergence both present opportunities and obstacles.

For such actors, international law is not “a kind of secular faith,” a “placeholder for the vocabularies of justice and goodness.”<sup>137</sup> Rather, international law regimes are utilitarian constructs, necessary expedients to achieve a desired end. Regime convergence occasionally furthers those ends. The fact that these regimes are perceived as effective to achieve the desired ends speaks volumes about the relevance of international law.

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136. Martti Koskenniemi, *The Politics of International Law—20 Years Later*, 20 EUR. J. OF INT'L L. 1, 11 (2009).

137. Martti Koskenniemi, *The Fate of Public International Law: Between Technique and Politics*, 70 MODERN L. REV. 1, 30 (2007).

